82-1570

NO.

In the Supreme Court of the United States

October Term 1982

RAFAEL ALVAREZ, Jr.
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HUMBERTO J. AGUILAR
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QUESTIONS PRESENTED FOR REVIEW

1. Is the Sixth Amendment right to the effective assistance of counsel violated when a single attorney represents two defendants, in a joint trial, and the trial court fails to properly inquire as to possible conflict of interest as mandated by both the Federal Rules of Criminal Procedure (Rule 44c) and established Supreme Court case decisions?

2. Is it a denial of a defendants Sixth Amendment right to effective assistance of counsel when a trial court has no reason to believe that a conflict exists, and, should the trial court fail to inquire concerning the propriety of joint representation or to advise a [criminal] defendant of his right to conflict-free representation is there a clear reversible error in that the defendant's constitutional rights have been violated?

3. Was there a denial of defendant's constitutional guarantees and a clear violation of this Court's holding in *United States v. James*, 590 F.2d 575 (5th Cir. 1979); cert. denied, 442 U.S. 917 (1970) when the trial court admitted coconspirators statements concerning Rafael Alvarez where there was insufficient independent evidence to link Alvarez to any conspiracy?

CERTIFICATE OF INTERESTED PERSONS

Rafael Alvarez, Jr.,

Petitioner

versus

United States of America,

Respondent

The undersigned counsel of record for Rafael Alvarez, Jr., certifies that the following listed persons have an interest in the outcome of this case. These representations are made pursuant to the Rules of the Supreme Court.

Rafael Alvarez, Jr.

J. B. Sessions, III, Esquire
(United States Attorney, Southern District of Alabama)

Barry Hess, Esquire
(Attorney of Record at Trial)

Solicitor General of the United States

By: _____
HUMBERTO J. AGUILAR, Esq.
Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, RAFAEL ALVAREZ, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this cause on January 31, 1983.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 698 F.2d 1379, and is attached hereto as Appendix A. The order is herein attached as Appendix B.

JURISDICTION AND JURISDICTIONAL STATEMENT

I. The opinion of the Court of Appeals for the Eleventh Circuit was entered on January 31, 1983. The jurisdiction of this court is invoked under Title 28 U.S.C. §1254(1).

II. The judgement of the Court of Appeals for the Eleventh Circuit was entered on January 31, 1983. Upon the motion of the Petitioner, the issuance of the mandate was stayed by the Court of Appeals to and including March 31, 1983. This Petition is timely filed. This Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1) and pursuant to U.S. Supreme Court Rules, Rule 17(a).

The Court of Appeals has decided an important question of Federal Law relating to a trial court's obligation to insure the effective assistance of counsel which has not been, but should be settled by this court. That the lower Court's decision has interpreted Rule 44(c), Federal Rules of Criminal Procedure in a manner which conflicts with the previously established standards of other District Courts of Appeals. Further, that the

Court of Appeals has decided a Federal question in a way in conflict with this Court's decision in *Holloway v. State of Arkansas* (1978) 435 U.S. 475, 55 L.Ed.2d 426, 98 S.Ct. 1173. That violation of the standard and mandate of F.R. Crim. Pro., Rule 44(c) gives rise to a possible, if not evident, violation of the defendant's Sixth Amendment right to effective (legal) representation and would be contrary to this Court's holding in *Cuyler v. Sullivan* (1980) 446 R.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708.

This Honorable Court's jurisdiction would therefore most respectfully be invoked under the various provisions and cases herein above cited.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Rule 44(c) of the Federal Rules of Criminal Procedure:

(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such

joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT OF THE CASE

On October 9, 1981, Rafael Alvarez was indicted by a Grand Jury in the Southern District of Alabama. He was charged with violations in a two count indictment. The first count charged co-defendant Luis Rodriguez and count two charged Luis Rodriguez, Eduardo Rodriguez and the appellant-herein, Rafael Alvarez with violations of Title 21, United States Code Section 841(a)(1). He was charged with wilfully, knowingly and unlawfully combining, conspiring, confederating and agreeing with other persons to knowingly and intentionally unlawfully distribute and possess with [the] intent to distribute marijuana, a Schedule I controlled substance.

In January 1982, the case proceeded to trial by jury. The Petitioner was represented throughout the trial by privately employed counsel, Mr. Barry Hess [who also represented co-defendant Eduardo Rodriguez] of Mobile, Alabama. The defendant was found guilty on count two of the indictment. He was sentenced to a period of incarceration of three years.

From that judgment and commitment the Petitioner, by his present counsel, took an appeal to the United

States Court of Appeals for the Eleventh Circuit. In his appeal he raised, inter alia, the following points:

(1) The defendant-appellant was denied his Sixth Amendment right to effective assistance of counsel and his Fifth Amendment right to due process when the Honorable Judge Hand failed to inquire whether the representation of both defendants by one attorney would raise a conflict of interest. That under the guidelines which are mandated by Rule 44(c) of the Federal Rules of Criminal Procedure and long established principles of accepted juris norm the trial judge was obligated to proceed to inquire as to possible and probable conflict of interest. It was further argued that conflict of interest in this case would have prevented the attorney from challenging the admission of evidence which was prejudicial to one client and not to another or from arguing the relative culpability at the sentencing hearing. The appeal highlighted the fact that in this case, at trial, one defendant, Eduardo Rodriguez, took the witness stand and the other, Rafael Alvarez, the petitioner before this Honorable Court, did not testify. The possible prejudice in the eyes of the jurors is inescapable.

(2) The appeal raised the additional grounds that there was insufficient independent evidence introduced at trial to link Rafael Alvarez to any alleged conspiracy. The trial court had erred in allowing co-conspirators statements made by Luis Rodriguez concerning Rafael Alvarez' involvement to have been used at trial. Further, the trial Court's failure to reexamine whether the government had introduced sufficient independent evidence on the record was an error and would have mandated reversal of the conviction.

The attorney who represented both Eduardo Rodriguez and Rafael Alvarez failed to properly indicate to the trial court that both defendants had been given their required notice under the holding in *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975) to knowingly and intelligently waive any disqualification of defense attorney noted by the court and arising out of conflicts of interest.

THE FACTS RELATING TO TRIAL COUNSEL'S CONFLICT OF INTEREST

The sum and substance of the evidence in the trial of Rafael Alvarez was the testimony of Drug Enforcement Administration Agent Harry Kearly who testified at trial. There was the corroborating testimony of a paid confidential informant, Bill Dickson. It was from these two individuals that the government attempted to illustrate the acts which Rafael Alvarez perpetrated in the furtherance of the [alleged] conspiracy. The facts as these appear on the trial record are as follows:

Harry Kearly testified that he is a narcotics investigator with the State of Alabama working on loan with the Drug Enforcement Administration in Mobile, Alabama. During his employment, he met Bill Dickson who later became a confidential informant (T, 85-86). Together they contacted Luis Rodriguez and set up a meeting in Miami, October 7, 1981 (T, 87-88). In Court, Harry Kearly identified Mr. Alvarez and Mr. Luis Rodriguez as the gentlemen he had met on his visit to Miami, October 7, 1981 (T, 90). At the meeting in the Miami Airport Inn (T, 89) Harry Kearly spoke with Luis Rodriguez and Mr. Kearly clearly assumed

that these conversations were translated by Mr. Rodriguez for Mr. Alvarez (T, 92). The discussions entailed the purchase of marijuana. Harry Kearly testified that he does not speak Spanish and the government stipulated that Mr. Alvarez speaks no English (T, 20 Omnibus Hearing). These facts were later corroborated by both Bill Dickson, the C. I. and Harry Kearly, the agent (T, 90 and T, 157-158) both of whom were present at the Miami meeting.

The government witnesses testified that a purchase of 200 lbs. of marijuana was made at that meeting (T, 158). The money would be paid two (2) weeks later. During the meeting Alvarez' involvement was merely to speak with Rodriguez and watch the opening of a small bag containing what appeared to be marijuana. When the bag was opened Agent Kearly testified "the defendant Alvarez made a motion with his hands toward his head, and I guess you could say rolled his eyes" (T, 95). The Agent could not remember whether Rodriguez or Alvarez handed him the car keys where he obtained the marijuana sample (T-92) and he could not recall whether Alvarez touched or sampled the small marijuana bag (T, 121). During this meeting no body microphones were worn to record the Spanish conversation (T, 129). There was no money delivered during the meeting nor afterward to any of the parties accused in the indictment. After the marijuana was sampled, Mr. Dickson left with Luis Rodriguez and Rafael Alvarez to rent a car but the parties were unable to rent a car for lack of a credit card (T, 97). After the problem with the rental vehicle, Mr. Dickson was left at the motel and both Alvarez and Rodriguez departed (T, 97).

Later that day at 3:30 p.m., Mr. Rodriguez called and advised that Alvarez and he would return to the motel at 6:00 or 7:00 p.m. (T, 97).

Mr. Rodriguez arrived at the expected time, but Rafael Alvarez did not accompany him (T, 98). Instead, Rodriguez was accompanied by someone identified only as Cookie (T, 98). Cookie and Luis Rodriguez then left the motel and carried 200 lbs. of Marijuana to Mobile in the trunk of the car (T, 99). Cookie and Mr. Rodriguez were not seen again until October 9th, when at the Mobile Travel Lodge they handed Agent Kearly a set of keys to a car wherein he could obtain the Marijuana (T, 101). This was the same vehicle that was seen in Miami by Agent Kearly (T, 101). Agent Kearly testified the car was Alvarez' but the record lacks any positive method of Identification such as a vehicle registration, License Plate or Title Certificate. The Marijuana was transferred by Agent Kearly to government vehicles and fifty (50) dollars for gas money was given to Luis Rodriguez so he could return to Miami (T, 102).

After the Marijuana was delivered in Mobile, Agent Kearly sent a sample to the Southeast Regional lab for analysis (T, 104). This same substance was identified at trial by a duly qualified expert Jeffrey R. Hufsey, a Forensic Chemist. He identified the material as cannabis (T, 149).

The confidential informant Dickson recorded three (3) telephone conversations with Luis Rodriguez (T, 170). Then he had a conversation with Luis wherein Dickson was advised they would come up from Miami to collect the money (T, 172).

On October 24, 1981, Dickson advised Agent Kearly that someone unknown to him was here collecting the money (T, 173). Agent Kearly instructed Dickson to arrange a meeting with Rafael and another associate at the Holiday Inn where they were staying (T, 174). Again Dickson went to the meeting without wearing a body mike. Agent Kearly and Dickson were cognizant that Rafael Alvarez would speak only Spanish (T, 124, 125). Dickson testified that payment of the 200 lbs. was discussed (T, 175). However, Eduardo Rodriguez, the defendant acquitted (ROA 46) by the jury, testified that his conversation with Dickson involved guns that Dickson could obtain for Alvarez (T, 251-255). Again Alvarez and Dickson had no direct communication. Alvarez and Eduardo Rodriguez were arrested waiting for a call from Dickson as to whether he had obtained the guns (T, 255).

The conflict was never apparent to the trial court yet it was clearly so to the attorney defending both Alvarez and Eduardo Rodriguez in that he approached their defense in a manner in which he could not 'save' both so one had to be sacrificed. In so doing the attorney created the conflict by committing a tactical decision where Eduardo would present his case and Rafael would not.

In the case before the trial court, Eduardo Rodriguez took the stand in his own behalf (T, 240). Rafael Alvarez did not at his own counsel's directive. Eduardo Rodriguez was found not guilty and Rafael Alvarez was convicted.

The Record in this case contains sufficiently clear and convincing indications which individually would

not represent apparent conflict of interest per se yet when compounded together, would fly in the face of fair play and effective assistance of counsel. Briefly summarized:

(A) Multiple representation significantly increased the probability that Petitioner would be convicted based, not on any of the actual evidence presented in the case, but rather, upon the fact that two co-defendants were represented by a single attorney; therefore were linked and associated together—more than mere guilt by association.

(B) Multiple representation precluded Rafael Alvarez' attorney from being able to fully penetrate and explore all avenues of possible defenses open to him including the possible culpability of the co-defendant. This was the attorney's way of tying his own hands behind his back and/or pulling his own punches in order to prevent hurting either one of his clients.

(C) Multiple representation prevented Petitioner's attorney from adequately preparing his client's defense in that it was sinfully clear that he proceeded to try to offer no possible defense for this Petitioner while arguing for the innocence of the co-defendant.

Further, the attorney at the trial level could not act as an advocate for his client in that he pursued one (1) defense and sacrificed the Petitioner—Rafael Alvarez would have been in the identical situation had he defended himself, without the effective assistance of an attorney.

The trial attorney further compounded his ineffective assistance to the Petitioner in two ways. First, he failed to enlighten the trial court as to the requirements of *U.S. v. Garcia*, 517 F.2d 272 (5th Cir. 1975) and second, he could not effectively argue lessened culpability at Petitioner's sentencing. The choice had previously been made by him in not allowing this Petitioner to fully explain his participation, if any, in this conspiracy.

This case at the trial level originated from a Federal Grand Jury Indictment in the Southern District of Alabama in the city of Mobile.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW RELATING TO A TRIAL COURTS OBLIGATION TO INSURE THAT IN MULTIPLE-DEFENDANT CRIMINAL TRIALS, EFFECTIVE ASSISTANCE OF COUNSEL IS PROTECTED AND THAT THIS NEW STANDARD IS IN DIRECT CONFLICT WITH EVERY OTHER COURT OF APPEALS.

This Honorable Court has been presented with the question of what actually constitutes conflict of interest sufficient to create an abhorrently apparent violation of a defendants Sixth Amendment right to effective assistance of counsel.

The Court below has gravely limited the scope of Federal Rule of Criminal Procedure 44(c) which requires that the court proceed to make an, on the record, determination and "promptly inquire with respect to such joint representation and [to] personally advise each defendant of his right to the effective assistance of counsel including separate representation." See *United States v. Benavidez*, 664 F.2d at 1258, N.2; This argument standing alone would have to fail yet when presented with the substantial and numerous holding of cases from other circuits creates a conflict in announced standards of determining what constitutes conflict of interest at trial. It further suggests that no clear cut mandated guideline has ever been reached by the Supreme Court.

This Court held in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) that, "Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel." The standard is further bolstered to conform the facts of this case by the court's holding "that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection." *Cuyler v. Sullivan, supra* at 345.

In the case at hand the appellant argued to the Court of Appeals that it is unquestionably the rule that an accused, whether represented by appointed or retained counsel, is deprived of his Fifth and Sixth Amendment

right to effective assistance of counsel, even in the absence of a showing of prejudice, when there is an actual conflict of interest due to joint representation.

The Court in *United States v. Medel*, 592 F.2d 1305 (5th Cir. 1979) states, "The defendants are quite correct in pointing out that where codefendants' interests are in conflict, the joint representation of codefendants by a single attorney may deprive a codefendant of his Sixth Amendment right to effective assistance of Counsel." See e.g., *Glasser v. United States*, (1942), 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (Here the Court found that it would be error for a trial court to order an attorney to represent codefendants whose interests are in conflict). In *Porter v. United States*, 298 F.2d 461 (5th Cir. 1962), the Court held that "The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court-appointed. Such representation is lacking, however, is counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others."

The key to the problem before the Honorable Justices is to define for all Courts who has the burden of showing actual conflict and should that burden ever shift to the trial judge? It is our respectful contention that the court has decided that the defendant through his attorney must delineate any conflict to the court. Should this element be lacking and the defendant's attorney fail in his task the court has set up safeguards.

See also *Sawyer v. Brough, Warden*, 358 F.2d 70 (4th Cir. 1966) in which the court states:

> "It is not necessary that Sawyer delineate the precise manner in which he has been harmed by the conflict of interest; the possibility of harm is sufficient to render his conviction invalid."

See also *McKenna v. Ellis, Director*, 280 F.2d 592 (5th Cir. 1960) and *Lollar v. United States* 126 U.S. App. D.C. 200, 376 F.2d 243 (1957); *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974).

There is a line of decisions which reasonably stand for the "actual conflict" rule (as argued most recently in *Benavidez v. United States*, 664 F.2d 1252 (5th Cir. 1982)) and these, out of necessity, stand as follows:

(A) The conflict was first clearly apparent at the outset of the trial and was brought to the court's attention or it surfaced during the course of trial and was handled by the trial court. See, e.g., *Johnson v. Hopper*, 639 F.2d 236 (5th Cir. 1981), cert. denied, ____ U.S. ____, 101 S.Ct. ____, 70 L.Ed.2d ____ (Nov. 2, 1981) (No. 81-60); *United States v. Martinez*, 630 F.2d 361 (5th Cir. 1980), Cert. Denied, 450 U.S. 922, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981); *Brooks v. Hopper*, 597 F.2d 57 (5th Cir. 1979); *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1981); *Gravitt v. United States*, 523 F.2d 1211, 1217 (5th Cir. 1975). See also *Glasser v. United States*, 315 U.S. 60, 68-76, 62 S.Ct. 457, 464-68, 86 L.Ed. 680 (1942).

(B) The apparent conflict arose when the codefendants had diverging and conflicting defenses

which may have included exculpating one while inculpating another. See e.g., *Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981); *Turnquest v. Wainwright*, 651 F.2d 331, 332 (5th Cir. 1981); *Johnson v. Hopper*, 639 F.2d 236 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3352 (Nov. 2, 1981) (No. 81-60); *Brooks v. Hopper*, 597 F.2d 57 (5th Cir. 1979). See also *Cuyler v. Sullivan*, 446 U.S. at 337-41, 100 S.Ct. at 1712-14 (claim that attorney decided not to submit evidence in defense in order to protect codefendants).

(C) The prosecution's case was geared toward the confrontation of defendant's theory under which he would be forced to testify and prove his innocence while proving his codefendant's apparent guilt. See *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975) (prosecution's own medical evidence indicated that defendant's joint acts with codefendants were not cause of murder victim's death, but that one codefendant's separate act was).

A related line of cases involves not representation of codefendants, but representation of a single defendant as well as another client whose interest in the outcome of the criminal trial conflicts with defendant's. In such cases, the conflict is necessarily apparent to the defendant's attorney at the outset of the trial. See, e.g., *United States v. Martinez*, 630 F.2d 361 (5th Cir. 1980) (attorney had to cross-examine former client who had been indicted for same drug transactions), cert. denied, 450 U.S. 922, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981); *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1981) (same); *Stephens v. United States*, 595 F.2d 1066 (5th Cir. 1979) (same); *Zuck v. Alabama*, 588 F.2d 436,

438 (5th Cir.) (defendant's attorney represented prosecutor in unrelated civil matter, and trial court was fully aware of conflict), cert. denied, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979); *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974) (defendant's attorney was actively representing prosecutor's principal witness in unrelated civil litigation); *Porter v. United States*, 298 F.2d 461 (5th Cir. 1962) (defendant's attorney was representing officer, whom defendant claimed entrapped him, in a police department disciplinary proceeding).

This case does not involve any of these situations but rather a unique position. Alvarez was instructed and advised by his attorney not to testify. His attorney made a decision to present a case for the codefendant and literally abandon Alvarez. It is understood that mere joint representation, standing alone, would be insufficient to be protected. In this case the court is not presented with a *United States v. Alvarez* 580 F.2d 1251 (5th Cir. 1978) wherein the court states "joint representation of codefendants is not a per se violation of the Sixth Amendment." See also, *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir. 1975); *United States v. Fannon*, 491 F.2d 129 (5th Cir. 1974), cert. denied, 419 U.S. 1012, 95 S.Ct. 332, 42 L.Ed.2d 286; *Holloway v. Arkansas*, 435 U.S. 475 (1978). Some actual conflict must be shown in order to be protected by both Federal Rules of Criminal Procedure Rule 44(c) as well as by *United States v. Garcia*, 517 F.2d 272. It is this Petitioner's contention that he could not have informed the trial judge of the conflict in that he was unaware of this until the end of the trial. Further, he could not have waived his right to raise the conflict issue because the court should have made the necessary inquiry in order

to allow the defendant to either waive the right to conflict free representation or acquire a different attorney. The Court of Appeals found "In the instant case, the trial court neither inquired about the joint representation nor personally advised the defendants of their right to effective assistance of counsel including separate representation," *United States v. Alvarez*, 698 F.2d 1379 (11th Cir. 1983). Both this lower court's ruling and the Benavidez decision would indicate that, "If there is no actual conflict, then the rule's purpose will not be served by reversal of a conviction," *Benavidez v. United States*, 664 F.2d 1255 at 1258.

II.

REGARDLESS WHETHER THERE WAS AN ACTUAL CONFLICT, THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT IN VIEW OF THAT COURT'S UNDISPUTED FAILURE TO COMPLY WITH RULE 44(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The Court of Appeals acknowledged that no inquiry was ever made. It is this Petitioner's contention that if there was a potential conflict it would have been impossible for Alvarez (a layperson) to ever discover it.

It is obvious that the potential conflicts occur frequently where the same attorney is representing two codefendants. In *Morgan v. United States*, 396 F.2d 110, the court held that the possibility of conflict of interest is present, "especially where there is a question as to whether either or both of the defendants

should take the stand . . . The attorney's freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants. And if, where two defendants are represented by the same attorney, one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable."

In *United States v. DeBerry*, 487 F.2d 448 (1973), the court's holding is clearly the aims of a F.R.Cr.P., Rule 44(c), "it seems to us that this is precisely the situation in which, as stated in *Morgan*, the trial court should have conducted the most careful inquiry to satisfy itself that no conflict of interest would be likely to result and that the parties involved had no valid objection."

Perhaps the most resounding attack upon the court's failure to conduct such an inquiry comes when the Court of Appeals states, "no one should be represented by an attorney who is making him the 'fall guy' by design. To hold otherwise would open the door to many abuses going to the essentials of a fair trial." *United States v. DeBerry, supra* at 454; see also, *Ford v. United States*, 126 U.S. App.D.C. 346, 379 F.2d 123 (1967).

The mere fact that a joint defendant trial is far more complicated, as a matter of procedure, shouid place some extra precautionary guidelines upon the trial court, or so it would be indicated by the holding in *United States v. Lovano*, 420 F.2d 769, 772 (2 Cir. 1970) which states:

> "the very fact that two or more codefendants are represented by the same counsel should alert a trial judge and cause him to inquire whether the defenses to be presented in any way conflict."

See also, *United States v. Tuglio*, 493 F.2d 574 (1974); ("the obligation of the trial court to monitor the constitutional rights of a defendant is not to be discharged as a mere matter of rote, but with sound and advised discretion"). See also, *Patton v. United States*, 281 U.S. 276, 312; 50 S.Ct. 253, 263; 74 L.Ed. 854 (1930).

It is not essential that all possible conflicts of interest be outlined for the trial judge nor that Alvarez delineate the precise manner by which he was harmed by the conflict of interest—the possibility of harm is sufficient to render his conviction invalid. See also, *Glasser v. United States, supra* at p. 73; *Sawyer v. Brough*, 358 F.2d 70 (4 Cir. 1966); *Campbell v. United States*, 352 F.2d 359 (U.S.C.App. D.C. Cir. 1965) the trial court has a responsibility to assure that codefendants decision to proceed with one attorney is an informed decision. See, *United States v. Foster*, 469 F.2d 1, (First Cir. 1972); *United States v. Mari*, 526 F.2d 117 (Second Cir. 1975); *United States v. Alberti*, 470 F.2d 878 (Second Cir. 1973).

The Petitioner submits that the trial court committed reversible error by the failure to have either a *Garcia* type hearing or to at least substantially comply with Rule 44(c). The compliance with this rule would have prevented a frivolous appeal should no actual conflict have existed. In the case of actual conflict of interest the situation could have prevented a violation of Alvarez'

Sixth Amendment guarantee. See *Advisory Committee Notes*, 77 F.R.C. 507, 594.

The lower trial court has created the problem by not allowing the defendant to be made aware of his right. A criminal defendant must know what troubles and problems await him when his attorney represents several other joint codefendants. It is the Petitioner's contention that multiple representation should be discouraged in order to prevent a problem such as this one from arising.

CONCLUSION

The Petitioner was denied his Sixth Amendment right to effective assistance of counsel. The Court of Appeals for the Eleventh Circuit ruled in the case of *United States v. Alvarez, supra*, contrary to what the various other Circuits have held in cases under the guidelines of F.R.Cr.P. Rule 44(c). Further the case law would have assured that Alvarez' conviction was overturned and a new trial should have been granted.

The Supreme Court has not given the attorney's trying multi-defendant trials the appropriate guidelines which are to be followed nor have the trial judges been able to follow rulings such as *Holloway v. Arkansas*, cited *supra*. It is this Petition that asks for some delineation of the Court's decisions as to joint (multi) defendant representation. The trial attorney must assure that his client's rights are protected and the trial judge must be navigator who steers clear of the shallows of unfairness and through the straits of injustice toward the safe harbour of fair, conflict free, effective assistance of counsel as guaranteed in the Sixth Amendment.

For these reasons, a Writ of Certiorari should issue to review the judgement and opinion of the Eleventh Circuit.

Dated: Miami, Florida
March 19, 1983

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit have been mailed to the United States Attorney (J. B. Sessions) for the Southern District of Alabama, 311 U.S. Courthouse, Mobile, Alabama 36602 and the Solicitor General, Washington, D.C. on this nineteenth day of March, 1983.

HUMBERTO J. AGUILAR, Esq.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Rafael ALVAREZ, Jr.,
Defendant-Appellant.

No. 82-7070
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Jan. 31, 1983.

Defendant was convicted in the United States District Court for the Southern District of Alabama, William Brevard Hand, Chief Judge, of conspiring to possess marijuana with intent to distribute it, and he appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) no actual conflict of interest was shown as result of joint representation of nontestifying defendant and codefendant, whose testimony did not inculpate defendant; thus, trial court's failure to comply with rule requiring it to inquire as to possible conflicts inherent in counsel's joint representation did not require reversal of defendant's conviction; (2) there was substantial evidence independent of coconspirators' statements to link defendant to conspiracy to possess marijuana with intent to distribute it; and (3) evidence was sufficient to support defendant's conviction.

Affirmed.

1. Criminal Law—641.5, 1166.11

No actual conflict of interest was shown as result of joint representation of nontestifying defendant and codefendant, whose testimony did not inculpate defendant; thus, trial court's failure to comply with rule requiring it to inquire as to possible conflicts inherent in counsel's joint representation did not require reversal of defendant's conviction. Fed.Rules Cr.Proc. Rule 44(c), 18 U.S.C.A.

2. Criminal Law—641.5

Where testimony of codefendant is corroborative or exculpatory, no conflict of interest arises from counsel's joint representation.

3. Criminal Law—641.5

Prejudice arising from a counsel's joint representation of defendants need not be shown where an actual conflict of interest is demonstrated.

4. Criminal Law—427(5)

There was substantial evidence independent of coconspirators' statements to link defendant to conspiracy to possess marijuana with intent to distribute it. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846; Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

5. Criminal Law—427(2), 428

If, after a *James* hearing, judge is satisfied that there is substantial independent evidence that a conspiracy existed, that coconspirator and defendant against whom the statement is to be offered were members of the conspiracy and that the statement was made during course and in furtherance of the conspiracy, then he may allow into evidence the statements of coconspirator; as an additional measure of protection, trial judge, on appropriate motion at conclusion of all the evidence, must determine as a factual matter whether the prosecution has established the three predicate facts by preponderance of evidence and if prosecution has failed to link coconspirator's statements to proof of a conspiracy, judge must determine whether a curative instruction to jury to disregard the coconspirator's statements will correct the default or whether a mistrial is mandated. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

6. Conspiracy—47(12)

Evidence, which established defendant's presence in Miami and Mobile at critical times and his direct participation in certain meeting, was sufficient to support defendant's conviction for conspiracy to possess marijuana with intent to distribute it. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

Appeal from the United States District Court for the Southern District of Alabama.

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

KRAVITCH, Circuit Judge:

Luis Rodriguez, Eduardo Rodriguez, and appellant were charged with conspiring to possess marijuana with the intent to distribute it in violation of 21 U.S.C. §846. Luis Rodriguez and appellant were convicted, but Eduardo Rodriguez was acquitted. Luis Rodriguez was additionally charged with and convicted of possession of marijuana with the intent to distribute it.

Appellant challenges his conspiracy conviction on three grounds. First, he contends that he was denied effective assistance of counsel because both he and Eduardo Rodriguez were represented by the same attorney, and actual conflicts of interest were present. Second, he contends that the government failed to adduce substantial independent evidence of Alvarez's involvement in the conspiracy sufficient to allow the introduction of coconspirators' statements under *United States v. James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). Appellant's final contention, although not clearly articulated in his brief, is that the evidence was insufficient to convict him. Finding no reversible error, we affirm appellant's conviction.

[1] Appellant's first challenge to his conviction is based on the trial court's failure to follow Fed.R.Crim.P. 44(c) and inquire as to possible conflicts inherent in counsel's joint representation of both appellant and Eduardo Rodriguez. The conflict arose, according to

appellant, because Rodriguez testified and appellant did not.

Fed.R.Crim.P. 44(c) provides:

> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

In the instant case, the trial court neither inquired about the joint representation nor personally advised the defendants of their right to effective assistance of counsel, including separate representation.

The purpose of rule 44(c) is to avoid actual conflicts of interest in joint representation situations. The rule acts as a prophylactic to insure that any conflict problems will be resolved by the trial judge early in the course of the proceedings. One secondary goal is to minimize the number of appeals such as the present one. It cannot be gainsaid that at least one ground for this appeal would have been avoided had the lower court complied with the rule. It does not follow, however, that the

mere failure to adhere to the rule, without more, constitutes reversible error.

The new Fifth Circuit in *United States v. Benavidez*, 664 F.2d 1255 (5th Cir.), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2963, 73 L.Ed.2d 1352 (1982), recently addressed this issue and held that where no actual conflict is demonstrated, the failure to follow rule 44(c) does not require reversal of the conviction. As the *Benavidez* court noted, the goal of the rule is not to promote the process of inquiry or the giving of advice but rather the avoidance of actual conflict. "If there is no actual conflict, then the rule's purpose will not be served by reversal of a conviction." *Id.* at 1258.

> The failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant. However, as is currently the case, a reviewing court is more likely to assume a conflict resulted from the joint representation when no inquiry or an inadequate inquiry was conducted.

Fed.R.CRim.P. 44(c) advisory committee note. Our review, therefore, must focus on the presence of any actual conflict in the joint representation.

[2, 3] Appellant argues that the conflict was present because Eduardo Rodriguez testified and appellant did not. If Rodriguez's testimony inculpated appellant, an actual conflict would arise. Where, however, the testimony of the codefendant is corroborative or exculpatory, no conflict arises. *See United States v. Medel*, 592 F.2d

1305, 1310 (5th Cir.1979); *United States v. Risi*, 603 F.2d 1193, 1195 (5th Cir.1979). As in *Risi*, 603 F.2d at 1195, appellant here does not allege that his codefendant's defense was in any way inimical to appellant's defense. He argues merely that he was prejudiced by Rodriguez's act of testifying. Prejudice need not be shown where an actual conflict of interest is demonstrated. *United States v. Medel*, 592 F.2d 1305, 1310 (5th Cir.1979). That Rodriguez took the stand, however, does not, without more, prove the existence of an actual conflict. We find no merit in appellant's ineffective assistance claim.

[4] Appellant asserts as additional grounds for reversal that the evidence offered at trial was insufficient to allow into evidence the statements of his alleged coconspirators and further was insufficient to support his conviction of conspiracy.

[5] Under *United States v. James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), the trial judge must determine the admissibility of a coconspirator's statements by deciding whether the government has offered *substantial independent* evidence of a conspiracy sufficient to go to the jury. Usually this is accomplished by holding a *James* hearing out of the presence of the jury. If, after the hearing, the judge is satisfied that there is substantial independent evidence that (1) a conspiracy existed, (2) that the coconspirator and the defendant against whom the statement is to be offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy, then he may allow into evidence the statements of the coconspirator. Fed.R.Evid. 801(d)(2)(E). As an additional

measure of protection, the trial judge, on appropriate motion at the conclusion of all the evidence, must determine as a factual matter whether the prosecution has established the three facts listed above by a preponderance of the evidence. If the prosecution has failed to link the coconspirator's statements to proof of a conspiracy, the judge must determine whether a curative instruction to the jury to disregard the coconspirator's statements will correct the default or whether a mistrial is mandated. *James*, 590 F.2d at 582-83.

At the *James* hearing in the instant case, the government presented two witnesses, an Alabama narcotics agent and an informant, who both testified that the appellant was present in a Miami hotel room while the marijuana transaction was discussed. Athough it was stipulated that appellant did not speak English and that neither the agent nor the informer spoke Spanish, it is clear that appellant was intimately involved in the negotiations. Through one of his codefendants, appellant told the agent to go to his (Alvarez's) car to retrieve a sample of the marijuana. As the agents negotiated with Luis Rodriguez, Luis would turn to appellant and speak to him in Spanish and appellant would reply. The two government witnesses further testified that appellant was arrested in a Mobile hotel room where he and Eduardo Rodriguez allegedly were awaiting payment for 200 pounds of marijuana that had been delivered to Mobile in appellant's car weeks earlier. We conclude there was substantial evidence independent of the coconspirators' statements to link Alvarez to the conspiracy.

The evidence adduced in the jury's presence tracked that offered at the *James* hearing. Although defense counsel did not ask the court at the close of all the evidence to reconsider its tentative decision allowing the coconspirators' statements into evidence, we nevertheless conclude that the preponderance of the evidence established the predicate facts of the existence of a conspiracy. Therefore, the judge correctly admitted the statements of appellant's coconspirators.

[6] Alvarez urges us to reverse his conviction due to insufficient evidence to link him to the conspiracy. We find his arguments unpersuasive. The standard of review set forth in *United States v. Bell*, 678 F.2d 547 (5th Cir.) (Unit B en banc), *cert. granted*, ____ U.S. ____, 103 S.Ct. 444, 74 L.Ed.2d ____ (1982), requires that we affirm appellant's conviction if "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *Id.* at 549. Appellant's presence in Miami and Mobile at critical times and his direct participation in the Miami meeting were highly probative of his knowledge and participation in the conspiracy. *See United States v. Holder*, 652 F.2d 449 (5th Cir. 1981). Applying the *Bell* standard to the record before us, we conclude that the evidence was sufficient to support appellant's conviction, and therefore, we AFFIRM.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-7070
Non-Argument Calendar

D.C. Docket No. CR-81-00066

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RAFAEL ALVAREZ, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

January 31, 1983

ISSUED AS MANDATE: